UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

In Re: Bair Hugger Forced Air Warming Devices Products Liability Litigation	File No. 15-MD-2666 (JNE/FLN)
	November 17, 2016
	Minneapolis, Minnesota
	Courtroom 12W
	1:00 p.m.

THE HONORABLE FRANKLIN D. NOEL
UNITED STATES MAGISTRATE JUDGE

(MOTIONS HEARING)

APPEARANCES

FOR THE PLAINTIFFS:

MESHBESHER & SPENCE
Genevieve M. Zimmerman
1616 Park Avenue
Minneapolis, MN 55404

CIRESI CONLIN
Jan Conlin
225 South 6th Street
Suite 4600
Minneapolis, MN

KIRTLAND AND PACKARD LLP
Behram V. Parekh
2041 Rosecreans Avenue
Third Floor, Suite 300
El Segundo, CA 90245

KENNEDY HODGES, LLP
Gabriel Assaad
4409 Montrose Blvd
Suite 200
Houston, TX 77006

FOR THE PLAINTIFFS:	KENNEDY HODGES, LLP David W. Hodges 711 W. Alabama Street Houston, TX 77006
	PRITZKER HAGEMAN, P.A. Ryan Osterholm 45 South 7th Street, #2950 Minneapolis, MN 55402-1652
FOR DR. AUGUSTINE:	J. RANDALL BENHAM J. Randall Benham 13 Robb Farm Road St. Paul, MN 55110-2526
FOR THE DEFENDANTS 3M:	BLACKWELL BURKE P.A. Jerry W. Blackwell Ben Hulse Mary Young Micah Hines 431 South Seventh Street Suite 2500 Minneapolis, MN 55415
	FAEGRE BAKER DANIELS Bridget M. Ahmann 90 South Seventh Street Suite 2200 Minneapolis, MN 55402
COURT REPORTER:	MARIA V. WEINBECK, RMR-FCRR 1005 U.S. Courthouse 300 South Fourth Street Minneapolis, Minnesota 55415

* * * * *

Proceedings recorded by mechanical stenography; transcript produced by computer.

* * * * * * *

P R O C E E D I N G S
(1:06 p.m.)

THE COURT: Good afternoon. Please be seated. Okay. We are here in connection with the motion of 3M in the Bair Hugger Forced Air Warming Device Products Liability Litigation. Let's get everybody's appearance on the record. Starting with 3M.

MR. BLACKWELL: Jerry Blackwell for 3M, Your Honor.

MS. AHMANN: Bridget Ahmann for 3M.

THE COURT: We'll get all of 3M who is here.

MR. HULSE: Ben Hulse, Your Honor.

MS. YOUNG: Mary Young.

THE COURT: Okay. And for Dr. Augustine?

MR. BENHAM: For Dr. Augustine and the Augustine entities, J. Randall Benham.

THE COURT: And for plaintiffs in the MDL?

MS. ZIMMERMAN: Thank you, Your Honor. Genevieve Zimmerman.

MS. CONLIN: Jan Conlin.

MS. ASSAAD: Gabriel Assaad.

MR. PAREKH: Behram Parekh.

MR. ORIBELLO: Noel Oribello.

THE COURT: We're getting everybody's appearance on the record. Do you want to speak up?

MS. HINES: My apologies. Micah Hines, Your Honor.

MR. BLACKWELL: For 3M.

THE COURT: Thank you. Welcome. Okay, so we're here on 3M's motion to compel discovery from third party witness Scott Augustine and Augustine Entities. Who is up? Mr. Blackwell?

MR. BLACKWELL: Yes, Your Honor, thank you.

Good afternoon again, Your Honor. Jerry Blackwell for 3M. We're here on the July 2016 subpoena that we served on Dr. Augustine and his various entities requesting various documents related to this litigation. I want to take just a second to talk about why it is that Dr. Augustine and his documents are relevant at all to what we're trying to do.

THE COURT: Let me just start by saying I have this feeling of dejavu all over again. Just about a year ago, we were here before there was an MDL, correct? Just in the Johnson case?

MR. BLACKWELL: That's right, Your Honor. And that was back in 2015. I think Your Honor's order was in November 2, 2015. And this will in part relate to rulings that Your Honor gave even then prior to the MDL. This then went into the MDL, and the restart button, the reset button was pushed then so we served another subpoena that in some ways overlap, but in some ways is broader than that

subpoena.

THE COURT: Okay.

MR. BLACKWELL: But we are interested in these documents in part for what we discussed just this morning. That is that plaintiffs are relying on Augustine-related Bair Hugger studies, and they even cite them in a long form Complaint. And they have brought these cases in the MDL against 3M for the Bair Hugger, and they claim that there are independent scientific studies that show that the Bair Hugger system is dangerous and defective. So that's the one reason.

They also contend that there's a safer alternative design, which is a part of the plaintiffs' burden in a number of jurisdictions, according to various jurisdictions of law. They identify what they refer to in quotes as an "air flow free warming technology" in their long from Complaint at paragraph 95, which they say is a safe alternative design. And this is exactly how the HotDog is described as this air flow free warming technology, and we refer to that in our brief at page 37,

THE COURT: Did they refer to the HotDog by name in the Complaint?

MR. BLACKWELL: No, Your Honor.

THE COURT: Just reference a safer design.

MR. BLACKWELL: An air flow free warming

technology with which is descriptive of the HotDog, perhaps amongst others.

The third reason is that the plaintiffs have adopted lock, stock and barrel the theories of the Bair Hugger defect that were espoused by Dr. Augustine before there was any litigation. So he said it first, then they said the same thing second, whether it is disruption of laminer or air flow contamination of internal components of the machine equal surgical site infections in the operating room or improper filtration equals causation of surgical site infection. So he said it first.

The plaintiffs' lawyer said it second in their Complaint. And then in between, there were discussions of some kind between either Dr. Scott Augustine or his cohorts with the Kennedy Hodges Law Firm here. That's a firm that's on the plaintiffs' steering committee before this litigation began. And we've not been able to get any documents related to that nexus, those discussions, to find out what exactly was said, took place, shared, et cetera, in that regard.

So we feel we're entitled to show through Dr. Augustine, given the plaintiffs' reliance upon him, his studies, his work that he either funded, supported or did himself at ground zero for the plaintiffs' case, that he developed this alternative technology to HotDog, and then he immediately launched into this campaign that's been prolific

and in many ways hidden and deceptive in attacking the Bair Hugger.

We, in Exhibit D in our papers, attach, include a copy of a letter where he in fact threatened 3M and Arizant that if we did not buy his HotDog technology to replace the Bair Hugger, that we would be facing this product liability lawsuit if we didn't do that.

And, number 3, we believe we'll be able to show that he then orchestrated the very science from which the plaintiffs are relying that there's highly relevant research that goes directly to the issue of whether the Bair Hugger can in fact cause surgical site infections that's been hidden. There were manufactured medical device reporting reports at one of the hearings. Your Honor may recall I asked whether any of the plaintiffs' lawyers in the courtroom knew where these MDR reports were coming from because they looked amazingly like the plaintiffs' Complaints all of a sudden when there have been next to none before this lawsuit started, which they're waiting for that discovery. But we did learn that Dr. Augustine's hand was in some of those that I want to talk about.

And we learned also that Dr. Augustine has even tainted the so-called independent scientific research that the plaintiffs have referred to early on in this litigation, and this was not revealed, and it was in fact concealed from

this litigation until now.

So why is it that we're here? It's because, Your Honor, we've gotten totally incomplete discovery responses. We've had five meet and confers with Mr. Benham going back to the summer, July 20th, the 21st, August 9th, October 20th, and October 24th. And we could see that we weren't receiving all of the documents, but we weren't getting explanations as to what was being withheld or why. So we have requested discovery on 29 of our requests in the current motion to compel, and we set those out in our motion papers.

Between July 20th and August 2nd, Mr. Benham made production, some production to us, it was sort of rolling that came in via e-mail. They were all labelled "Responses To Requests Number 47," which related to information on the plaintiffs' studies with the exception of four pages that responded to request number 15, which related to documents sent to any media outlet regarding the Bair Hugger system.

So for the various other categories, we didn't receive anything that expressly provided documents in response to those with the exception of objections, with respect to those.

So we served our discovery on all of the various Augustine entities, and there are six of them that we set forth. The -- well, Mr. Benham and Dr. Augustine are

claiming that they have responded to all of our requests, but as I pointed out to Your Honor, they specifically responded to just two, and I want to point out why it is that we know that we're not getting fulsome responses with respect to any of them.

So what we know we've gotten is we've got next to nothing in response to most of these requests. We did hear from Mr. Benham that Mr. -- sorry, Dr. Augustine's computer was stolen and then we heard that his computer was stolen again. It was stolen twice, and so this is part of the reason that we don't have complete disclosures of documents.

There is no discussion as to what happened to the e-mails that would have been on the company server and documents, and what about all of the other e-mails and documents that pertain to all of the other principles in the Augustine entities, including Mr. Benham and the president of the Augustine's company, President Brent Augustine, and there are other principles and key leaders from whom we have again next to nothing. So there are 23 e-mails that are listed on the plaintiffs' privilege log, and by and large we haven't gotten them.

So the number one reason we're here is because we have incomplete discovery responses; and number 2 is because we're here once again on the whole issue of the privilege log. When we were here back here in October of 2015, the

problem was that there was no privilege log created, which is not going to give you the documents and didn't create a published log. Now, there's been one created, but it doesn't comport with the rules. There's not sufficient information in the privilege log to be able to assess whether a privilege applies or not, which is the minimum that's required under Rule 26 for privilege log.

So, Judge Noel, I want to take a few minutes to talk about how it is that we absolutely know that we've received incomplete discovery, and that is apart from the fact that we only had documents produced in two categories in the first place. And the reason relates to the third party discovery that we have gotten and what it shows us.

There is no more fundamental question in this entire litigation than whether the Bair Hugger system releases bacteria, sufficient bacteria in its exhaust air to cause surgical site infections. We learned from third party discovery essentially that Dr. Augustine had in fact been involved in studies on two different occasions where the goal was to attempt to colonize bacteria from a properly functioning assembled Bair Hugger system.

There was one done in 2007 right here in Minnesota down at the Regina Surgical Center in 2007. And this was done in the operating room. It tested whether the Bair Hugger system could cause this type of bacterial

contamination. It's cited as Exhibit I in our papers, and the brief at page 22. They weren't able to generate any significant contamination when the system was used and assembled properly.

THE COURT: Is this a published study?

MR. BLACKWELL: It's not a published study.

THE COURT: When you say it's cited in your things, where is it cited to?

MR. BLACKWELL: To e-mails that we've gotten from third parties that relate to the fact that this testing was done.

THE COURT: Okay.

MR. BLACKWELL: And so we don't have e-mails at least from Dr. Augustine. We don't have the particulars around that testing that was done. And no reason to believe that we received either full data documents, results or any electronically stored information around it.

THE COURT: And the third party from which you got this information doesn't have or wouldn't have the full data and stuff that you're looking for?

MR. BLACKWELL: No, I'm looking here that we only got the e-mail from the third party, but didn't have the full data. And, Judge Noel, actually I'm just recalling a different instance where one of the third parties was saying that his data was being sought after by 3M, and he was

actually writing to Dr. Augustine saying you've got all of this data stuff as Augustine Medical, so could you help me with this?

But the point here being we didn't know this existed at all but for the fact it came up through a third party, and that was in 2007. It was a fail. They weren't able to get conde-forming (phonetic) units from the Bair Hugger when it was assembled in the operating room at Regina Surgical Center in Hastings. Well, they tried again in 2009, and this was at that North Umbria in the UK, at that hospital.

And you, again, might remember from the very first hearing we had where the plaintiffs brought up a certain study McGovern, and I asked the Judge, "put a red circle around that and wait until you hear about McGovern." And they haven't said much about it since since it ultimately concluded that this study doesn't establish causation.

Well, at that same hospital, Dr. Augustine was involved in a study there also where he financed and supplied equipment for a microbiology study at North Umbria Health Care in the UK. And, again, the goal was to try to culture bacteria from the Bair Hugger system. Again, the effort failed to produce the bacterial contamination that he hoped for. And it was insufficient data to even have been accepted for publication anywhere.

So we failed to receive the e-mails related to that testing. And, again, given that it wasn't even referenced, we have no reason to believe that we've gotten any fulsome data, results, or other documents of ESI related to that either. And if we had known about this, we would have discussed it during the science day. We only talked about the Avedon study in 1997 in South Africa where they tried to do the same thing with the Bair Hugger and got the same result, but we didn't get documents related to that.

So not stopping there. There is an issue about the medical device reporting. And Your Honor might remember that these medical device reports are reports that are filed with the FDA that are concerning alleged adverse events or problems associated with the medical device.

THE COURT: This is what the paper you referred to as a Med Watch report?

MR. BLACKWELL: Yes, that's right, Your Honor. It's referred to the Med Watch report from 2010. And what we learned, and I'll put this in just for the record, that Exhibits D, J, and K of our papers refer to this Med Watch reporting and how it was utilized by Dr. Augustine and Mr. Benham. And it's referred to in our brief on pages 16 and 17.

And so Augustine there repeatedly claimed to both industry figures and maybe even the Court given that there's

an affidavit, that this Med Watch report from 2010 is a long and detailed MDR Complaint about Bair Hugger warming that in quotes "an independent anesthesiologist Dr. Robert Gauthier filed with the FDA."

Well, I deposed Dr. Robert Gauthier, and we're surprised at what we learned. And he told us that he in fact, number one, was not the person who filed the Med Watch report that's attributed to him. And, number 2, he wasn't really the person who wrote the Med Watch report that was attributed to him. He says this report that is touted as having his name was in fact drafted by Mr. Benham himself and Dr. Augustine.

THE COURT: I don't think you were really surprised when you learned that, were you?

MR. BLACKWELL: Well, I like to say I was, but I should have been, but I wasn't, Your Honor. So we learned that in fact this had been written by Dr. Augustine and Mr. Benham, that he had put edits on it, and the tenor of his edits were to tone down the language that Dr. Augustine and he says Mr. Benham had put into this report.

It's significant here because this particular Med Watch report was circulated to an Arizant board member in an attempt to encourage this board member to withdraw their investment in Arizant and claiming that this was an independent report, that was a report from the independent

anesthesiologist. And we set forth here in Exhibit D a copy of that reference that where they claim that there was this independent Med Watch report when it was really kind of a puppet scenario where the head was Dr. Augustine and Mr. Benham.

So we haven't been able to obtain documents that Dr. Augustine or Mr. Benham have showing their involvement in this Med Watch report, no e-mails, documents, don't know of this correspondence, but we just don't have the data or the information surrounding it, and it should have been produced in response to our request.

So when we had asked to produce documents related to FDA filings, they claim confidentiality and privacy. And Your Honor may not recall, but this very issue was brought up when we were here last October, the issue of this Med Watch report. And what was told to the Court then, first off, Dr. Augustine pretended not to know what the letter was we're talking about that went to Med Watch, though he was the one who sent it. And we had to move to compel to produce documents regarding that letter, and that motion, that's at Exhibit N in our papers.

And then at the hearing on October 26, 2015, on the motion to compel, the charade continued, and Mr. Benham told this Court that -- and this is a quote -- "absent looking at the letter and reading the references they are

talking about, I have to make a guess as to what they're talking about." And what we were talking about is a letter he wrote with Dr. Augustine and a letter he sent with Dr. Augustine. He claimed he couldn't find the letter and didn't even know what we were talking about, and that's referred to in our brief on page 19. The Court rightly saw through this and ordered him to produce the document.

He then produced only the Med Watch report itself and attachments, which you'll see at Exhibit P, and never produced e-mails, correspondence, drafts or anything else regarding the report, which we learned from Dr. Gauthier. And at the end of this, Judge Noel, I will say that there are certain aspects of this that are worthy of consideration for some form of a sanction because getting discovery ought not be this hard, frankly.

So that's the Med Watch report. But then in addition, they failed to produce documents related to Dr. Augustine or his employees' involvement in the so-called independent studies that I made reference to in starting this. And what we learned in relation to Mark Albrecht, a person whose name came up this morning, Mark Albrecht. And so he's a former Augustine employee. He's not only that, Dr. Augustine helped to pay his way through college. He is one of his researchers.

Dr. Albrecht, I think he's a doctor, authored six

of the studies upon which plaintiffs rely. Some of those studies contained disclosures indicating financial report by Augustine or his company, but two of the studies purported to be independent ones, and we discussed these at footnote 7 on page 15 of our brief.

We learned in fact that this Augustine-Albrecht taint is also only so-called independent studies. When we deposed Dr. Albrecht, he testified that he had his hand in both of those so-called independent studies, the Legg studies, L-E-G-G, Legg studies, and that he was an employee of Dr. Augustine at the time. There's nothing in those studies that would indicate Dr. Albrecht's involvement, but he said he was involved, and there's no way to know that. But we know it from third party discovery.

We also know that Dr. Augustine was communicating with the authors of the so-called independent scientific studies that the plaintiff is relying on. And if you look at Exhibits S-X, as in Sam through X, these are e-mails that reveal that Dr. Augustine was also involved in a campaign to involve himself in the scientific literature to try to discredit the Bair Hugger. And there wasn't any disclosure about his involvement in the so-called independent studies either. We found this from third party e-mails, but we didn't get anything from Dr. Augustine that shows his involvement or that of his cohort Mark Albrecht.

So the other two areas Your Honor relate to this an e-mail campaign that Dr. Augustine has been involved in. He has a number of web entities, www.entities. That he is really the hand again behind the puppet in these, and he uses those to send out blast mails, primarily on the Bair Hugger and in commenting on the litigation, et cetera, with a real agenda and an ax to grind. And he sent these out again for his proxy companies. And they've included from time to time videos, very social media activities, communications with health care entities. But he sent it out all these e-mails. And under the one guise or another of these various entities criticizing the Bair Hugger and characterizing the litigation.

If you look at Exhibit R, as in Ralph is an example of those, we haven't had those produced yet. They are related to this campaign that he's been engaged in. He sent these out to anesthesiologists promoting investment in his competing HotDog system. And in one instance, he claimed to rely on an article that he wrote that's called, "Forced Air Warming Is Associated With Periprosthetic Total Joint Replacement Infections." And it was described as submitted for publication. And you'll see that at Exhibit DD. And this was just weeks ago, October 4, 2016.

We asked where is the study? You sent it around to these anesthesiologists, produce it. They refused. No

explanation given other than we don't think the Court is going to let you have it. And we didn't get it. And they wouldn't produce it to us, though he's been sending it about without stating any legal basis for it.

And last but not least, Your Honor, are the documents that relate to the HotDog warming system itself, and we believe those documents will show bias and that is this bias that underlies the plaintiffs' very science case. They essentially took the poisoned bait or the tainted bait. And while at this point they may be kind of cutting the ties with Dr. Augustine. When we hear back in October 2015, we pointed out to the Court that at one point it listed him as an expert of their's. Then there was a letter that we showed where they said they withdrew that, that he was not an expert of their's.

But you want to see documents that relate to this HotDog system for the reasons that we referred to earlier about the alternative design and to what extent his statements about an error-free technology and its relevance to this litigation is part of the underpinning for the plaintiffs' case factually. We want to know what's been communicated in that regard and have an opportunity to explore that too. It goes to issues of credibility and bias for the plaintiffs' case given that he has a very significant ax to grind with his competitor.

So that's the ball of wax with respect to what we know we have not gotten, but in terms of by way of the third party discovery that revealed to us what we haven't gotten. The issues with respect to the privilege log, I think are more straightforward. It's pretty clear that the obligation under the rules, Rule 26, it's clear that a privilege log has to contain enough information to determine whether the privilege truly applies to each individual document, and that is not what we've gotten. There are, if you look at Exhibit H, which contains the privilege log, there are a number of deficiencies and problems with it that are fairly obvious in just even looking at the rule.

For example, every single document on the privilege log presently lists the same people as both authors and recipients as though they are somehow writing to themselves. We need to know the dates, the number of exchanges, and parties to each exchange to evaluate a claim of privilege.

Your Honor can see that every entry now everyone also search both attorney-client privilege for all parties to the communication and work product protection for all attorneys lumping together all information and advice in each document. Again, that's not sufficient information for us to determine with respect to a given document if a privilege applies or not. We need to know the specific

claimed basis for each of the documents.

And then, last, every assertion of privilege asserts that the communications relate to "potential product liability, unfair competition, and/or other claims." Now, this is a vague and indefinite description that omits the information necessary to evaluate the claim of privilege including what particular litigation is even at issue.

So, Judge Noel, what we want with respect to the privilege log is, first and foremost, an order that would require Dr. Augustine to provide additional detail for each document such that we know the parties to the communication, the date of the communications, the specific litigation addressed by the communication, the basis for the claim of privilege or other protection, and a sworn statement identifying the beginning and ending dates during which Dr. Augustine claims he had an attorney-client or litigation consultant relationship with the Kennedy Hodges firm.

And that last part is important. I just want to bring back to Your Honor's recollection from our last hearing, we had quite a discussion about whether there was an attorney-client relationship between Dr. Augustine and the Kennedy Hodges firm. And there we had pointed out to the Court that the Kennedy Hodges that represented in the *Walton* case, that Dr. Augustine had no attorney-client communications with the firm related to the Bair Hugger.

And we talk about this at pages 31 and 32 of our brief, 31 and 32. And at the same time, Dr. Augustine is invoking the attorney-client privilege with respect to communications with the firm that Kennedy Hodges says doesn't exist. So there's no indication that they represented him beyond the time period of 2009 anyway much less that they had anything to do with the representation related to the Bair Hugger. And not only that, they also were clear that they didn't have a role as an expert or a consultant, which knocks out any claim of the work product protection, unless he is claiming that he is now working with another one of the lawyers on the plaintiffs' side, which we haven't heard. So there ought not be the claim or privilege based on attorney-client privilege.

And what we want with respect to the other discovery we've talked about, and it may be by the time this is done, Judge Noel, we'll just end up having to have some discovery on discovery, which is not the most fun thing to do, but sometimes it's necessary to get at what was done since they are making the claim that we haven't completely responded. And so to get at what was done to come up with this complete response, we knew at the very least that we'd like to have an order requiring Dr. Augustine to identify and produce documents, e-mails, other electronically stored information responsive to our list of requests. The ones

that we've set forth in our motion papers.

And then for number 2, which is the real punch line here, this is the part that we don't know that we may need discovery on discovery at deposition to get at. But failing that, deposition would want a sworn statement that identifies all the records custodians whose documents, e-mails or other electronic documents were searched, which files and electronic files were searched, such as personal e-mails, company e-mails, computer drives, and what key words or other methods were used to identify responsive documents. The same sorts of things that we have spent much time in the MDL status hearings on a monthly basis talking about generally with respect to discovery on discovery. And it would help us then to be clearer about what was searched, what wasn't, and what still remains outstanding.

And, finally, Judge Noel, I'll sit down after this. As I mentioned to Your Honor, I do think there are grounds here for sanctions. You know, the MDR reporting in and of and by itself, the fact that, first, there had to be a motion to compel brought around the Med Watch report first. We got in front of Your Honor, and it was clear then that they should produce those documents. They were in front of this Court and on the record on behalf of Dr. Augustine and Mr. Benham, essentially said we don't know what they're referring to when they're the ones who wrote

it, when they're the ones who sent it. And I point out, Your Honor, as far as we know, they haven't sent a hundred such reports to the FDA, so it isn't hard to remember this one, and they said they didn't do it. And so now we're here again on another motion to compel, because now we have complete discovery around that. And so how many times is enough time is the question?

The issue of the article that Dr. Augustine drafted in October and sent around to these anesthesiologists they refused to produce. There's no justification or basis for that, when he says that it is going to be released for publication. He's already communicated to the anesthesiologists about it. They have it, and have no good faith basis for not having given it up.

Third, the privilege log, it's not that hard to read the rules about what's required for a proper privilege log, and this wasn't making a minimal effort. And if I may, Your Honor, just point out, and I won't belabor this, but I wanted to hand it up to the Court for whatever it's worth. What this is, if I may, Your Honor, just approach and explain.

THE COURT: Tell me what it is.

MR. BLACKWELL: I will. This just simply chronicles our many discussions with Mr. Benham on our meet and confers in an effort, so it just puts them all on a

chart. And, Your Honor, they can see how much work we've put into it.

THE COURT: Let me ask this question, so when we were here before in October of 2015, one of the items being sought and one of the things I ordered was that Dr. Augustine sit for a deposition. And I understand that did not happen or that did happen?

MR. BLACKWELL: Your Honor, it did not happen. It was right at the lip of going into the MDL.

THE COURT: And that's not part of the relief you're seeking here today, is that correct or incorrect?

MR. BLACKWELL: That's correct. And I will point out to Your Honor, that's not part of the relief. We have currently a deposition date set for Dr. Augustine of December 13th, which depending on what happens to the document we'd like to have the documents before there's a deposition. And the discovery deadline for general issues as Your Honor knows is January 20th.

THE COURT: Okay.

MR. BLACKWELL: Thank you, Your Honor.

THE COURT: Thank you. Mr. Benham?

MR. BENHAM: Thank you, Your Honor. I think there's something unusual happening here. I think there's an agenda that's being pursued which goes beyond discovery. I'm completely confident that no matter what my client

produced in response to the discovery that I would still be standing here today. And the reason is clear, there are 900 or so cases out there. The research is strong. The journals are renowned. The scientists are real scientists. And so 3M has apparently decided that it's only hope of success is to destroy the credibility of Dr. Augustine, who was the inspiration for some of this discovery. And rather than actually attacking the research, it attacks Dr. Augustine to cast doubt in your eyes, cast doubt in Judge Ericksen's eyes and, ultimately, to cast doubt in the eyes of the jury. That's background. So let me address the issue.

As I said in the affidavit I'll put into the Court, I put a hundred hours or so, although I don't keep track of my hours. Maybe it's 80, maybe it's 120. I put a lot of time finding, producing documents, and dealing with these issues. But 3M alleges that my client and I have not properly searched for and produced documents. They apparently have a fantasy of what documents they think exist even though some of them are seven or eight or nine years old. And because those fantasy documents weren't produced, they believe that they're sitting under some chair someplace smoking, and I'm refusing to produce them. Well, that's just not true.

On the other hand, if they really did believe

that, they would have taken me up on the offer that I made last week or slightly longer to engage outside counsel, start all over, confirm and redo what I did, and all I ask is that they pay for it rather than me. I'm perfectly willing to step aside and get the Fredrikson law firm involved, redo the whole discovery from scratch, electronically compare what they find with what we've already produced, and let them produce whatever is new. That offer remains open. Otherwise, I urge that they accept what I've produced because I've produced what I found.

THE COURT: Let's take one example that was just mentioned. So apparently there was some e-mails sent out to anesthesiologists within the last month or so referencing some research that's about to be published, and Mr. Blackwell says that hasn't been produced, yet it came from Dr. Augustine. So why would that not have been produced?

MR. BENHAM: There was an e-mail that was sent to potential investors, some of whom were anesthesiologists, and it addressed a large number of things. You know, I'm uncertain. I heard him say that the article was attached to it. I'm uncertain if that's true. I don't want to tell you it's not just because I don't know. But I do know that there was a reference to an unpublished article, and it said it was submitted for publication. And I urge you that an

article, what you told me was tell them what Dr. Augustine is communicating to the world out there. An unpublished article is not something that he's communicated to the world. It's got to go through peer review. It's got, you know, maybe it will be accepted or rejected. It's going to be edited by the journal. It may be rewritten. And if 3M gets to see research before it's published, how far back do they get to go? If Dr. Augustine has an idea for another article --

THE COURT: Well, except that their request isn't anything that he tells the world. The request was any social media content, which is defined to include blah, blah, blah and/or e-mail, drafted, created and/or sent by you, any person or entity you sponsor, sponsored or any other -- or and/or any person who acts, acted on your behalf or at your direction concerning the Bair Hugger warming system, forced air warming, the Bair Hugger warming system litigation and/or the defendants. Isn't this the e-mail that we're talking about fall precisely in that request?

MR. BENHAM: Until this instant, my understanding that their interest was in the underlying article that was referenced, not the e-mail itself. If it's the e-mail there itself that is the issue, I have to ask is this an ongoing obligation forever, any e-mail not the date of discovery back, but forward into the future? Every e-mail that my

company sends to anybody about our number one competitor has to be shared with our number one competitor? Is that really the obligation? Because I understood that it was the communications from the date of discovery, first discovery back from the date of the second discovery back, and anything related to the safety or effectiveness of Bair Hugger, and that's what I produced. That's my understanding.

My hope is research that's inchoate, research that's being thought of, research that's being negotiated with researchers, communications with universities around the world, that should not be revealed to our number one competitor for several reasons, including the fact that 3M is a behemoth out there. They have the power to thwart our ability to do research, and so sharing that sort of information with them in advance will effectively thwart it.

The next question I'd like to address is documents concerning HotDog itself. Now, their argument is they have to deal with whether there's a reasonable alternative out there. I understand a little bit about that area of the law, not much, but I know that that's true. But does that actually mean that they get to look at all the communications with our customers? They get to find out what our customers like and didn't like? If we had a product that failed because of an electrical reason, and we

do internal work and improvement it, they get to see that. That's a level of detail, which I would argue is not necessary to deal with the question of whether there's an alternative product. They know from their own sales force that there are alternative products. As I put in my papers, there are several alternative products, and the Bair Hugger product loses business to them sometimes. That in itself is proof that there's an alternative product.

There's a product out there called buy heat, which is very similar to a significant part of the HotDog product, and 3M must know that it's an alternative product because they just acquired the rights to exclusively distribute it. So 3M is now distributing its own error-free product out there. How can there be any doubt that there's an alternative product that's out there that's acceptable?

And, you know, under ordinary circumstances, no company should be required to reveal that sort of private confidential information about its relationship with its customers, but especially to its behemoth of a competitor. A competitor whose goal is to destroy it, and especially to the Blackwell firm. I mean they're not just a law firm representing 3M. They host a website that attacks Dr. Augustine and promotes 3M products. There is a difference between being a litigation firm in support of a client and being an advertising and PR firm in support of a

client. I submit that you would not ask us to reveal my clients inner most secrets to 3M's PR firm. That seems a bit too far.

The Med Watch issue, I mean they asked for the documents. I wrote back to them and said the FDA says this is anonymous. The FDA requires filings in Med Watch of a medical device manufacturer who has any reason to believe that its product has hurt someone. It doesn't make any difference whether they agreed with it or not. They have to file. And there's nothing quite as clear that someone thinks your product has hurt someone. It's when they sue you, and the documents that I filed give language in the FDA, which makes that clear. There have been 900 or so of those filings, and 3M has not filed a single Med Watch report in violation of their obligations to the FDA.

The FDA also encourages others to anonymously file Med Watch reports if they have reason to believe that a product has hurt someone, and they protect the anonymity of those filers.

Your Honor, if you decide that FDA rule should be violated, breached, circumvented, I'll respond promptly. But I do need to tell you I've looked at the Med Watch website, and I know that it is an electronic website. One fills it out, hits a button, it goes to the FDA, and it's gone. So I'm not exactly certain what documents they think

exist. But they are going to take --

THE COURT: I told you what documents they're looking for. They said they talked to this other guy Gauthier who said I got a draft written by Augustine. I edited it, sent it back to Augustine, and I assume that draft then becomes the content that you're describing going into the website. Are you telling me that the drafts don't exist?

MR. BENHAM: No, we're talking about two different things. There is the initial 2010 or so Med Watch report that was submitted by Dr. Gauthier. I submitted what -- I produced what documents I found related to that. If they think there are other documents, let them take me up on my offer and bring the Fredrikson firm in and look for them. I can't find them.

They are going to take Dr. Augustine's deposition on the 13th of December. And when asked what role did you have in the Med Watch report filed by Dr. Gauthier, he's going to answer it fully and honestly and with not the slightest embarrassment about what his role was. You know, there's no hiding there. I mean there are things in that Med Watch report that on their face of it, it would be impossible for Dr. Gauthier to know. There's really not much argument about that, that Dr. Augustine had a role in creating that. I mean if they want to talk about what my

role is, our view, I'll certainly answer that question, but I mean there's nothing being hidden there.

The Med Watch reports that I was referring to were related to the hundreds of Med Watch reports that 3M should have filed, didn't file, and have been filed by a voluntary filer. I think the FDA allows that voluntary filer to remain anonymous. I'm not certain that I deeply care. But if you require that anonymity to be breached, we'll respond appropriately.

The privilege log is a complicated issue for me. I mean I sought guidance from the Faegre firm and the Blackwell firm from the very beginning about what should be on the privilege log. I did readings and I submitted an initial privilege log. I had several conversations with them on the phone and said, "what do you think should be on it? What do you think should be on it? And I won't produce it until you send me an e-mail confirming what you think should be on it." I put on it what they said should be on it, and that was apparently insufficient.

Now, as I wrote to the Court, there are facts surrounding the various claims of privilege, which neither side on this case has a right to see. But I would be happy to provide the Court with the Court's Eyes Only affidavit explaining it all. In fact, I have a hard copy of the affidavit right here with me. And if you would accept it, I

would hand it in at this very minute.

THE COURT: I'm sorry. I'm confused. You have an affidavit doing what?

MR. BENHAM: An affidavit from me explaining the various legal relationships and support for the privileges claimed in the privilege log. There's a level of detail that I don't -- that I can't share with either of these parties without destroying the privilege. And so I offer it to share it with you.

MR. BLACKWELL: And we would object to that at this time. There's not a proper foundation for it, Your Honor.

THE COURT: All right. I'll ponder that before I decide about it, so.

MR. BENHAM: A foundation objection for something that I will purport that I wrote seems a little odd.

So, Your Honor, my client has complied as well as it can 80, 100, 120 hours of time has been put into it. We have produced the documents that we have found. The only documents we haven't produced are those to which we have objected. If they don't believe me, let them pay for the Fredrikson firm to come in and do it all over again. Thank you, sir.

THE COURT: Okay.

MR. BLACKWELL: May I respond briefly, Your Honor?

THE COURT: Yes, let me ask you this: What about this anonymity law that Mr. Benham says the FDA provides to the Med Watch filers?

MR. BLACKWELL: Well, Your Honor, there's no such thing, even if you accept it as true, which I don't. I just heard Mr. Benham refer to that. Any anonymity law or rights to it can be waived by a party. They can choose to make it not anonymous, which is exactly what Dr. Augustine and Mr. Benham did.

And you'll look at Exhibit D in our papers where I quote from the Augustine Biomedical and Design letter dated July 9, 2010, signed by Dr. Scott Augustine, where he writes to an anesthesiologist for funding purposes, "Coincidentally, last week an independent anesthesiologist filed a long and detailed MDR Complaint about Bair Hugger warming and Arizant to the FDA. A copy of the Complaint is enclosed for your review."

So here they are out touting this as independent, first of all, when it was written by the two of these. And it's only considered confidential and protected when we seek discovery of what it is they're in fact sending out to the public with respect to this, and they have made it public. They have put it in contention. They have put it at issue. And to the extent they are now using this --

THE COURT: Right, I understand that, and then

we'll get -- as I understand Mr. Benham, when Dr. Augustine is deposed, he's going to tell you all about that 2010 Gauthier filing, but he says there is all of these hundreds of others that are protected by the anonymity protection that the FDA provides. And I'm asking you what is your position regarding whether there is anonymity provided for in the law. And if it is, do I have the power in the context of the discovery dispute between a defendant and a third party witness in a multi-district litigation to overrule it?

MR. BLACKWELL: And, Your Honor, I don't want to misstate the law in that regard. I take Your Honor's question to heart. We would request leave to submit a supplement that addresses that because I want to make sure we get it right. But I think to the extent it relates to the Bair Hugger that they've put at issue, that that privilege, number one, is not inviolate, and that it can be protected by a proper protective order with respect to it. But we would like Judge Noel to be able to submit just something brief and supplemental in that regard to address that issue.

THE COURT: All right. I'll let you know if I need that.

MR. BENHAM: Your Honor, would you allow me to address that?

THE COURT: Hold on, one second. One at a time.

MR. BLACKWELL: And so, Your Honor, with respect to these other matters to the extent that there have been again e-mails sent out related to the article that Dr. Augustine is referring to, and he is sending this out to investors for purposes of a spawning or encouraging funding and it exists, it's a fact that's relevant. And to the extent he's concerned about it being properly protected and privileged, again, that can be addressed through a proper protective order also.

THE COURT: And what about his argument that the discovery requests, as I understand it, were served back in July. And the thing we're talking about right now and that I asked that you mentioned in your argument, and that I asked Mr. Benham about is something that has occurred since those discovery requests are served. Is it your contention that he has an ongoing obligation to continue to update discovery just as a party would in litigation?

MR. BLACKWELL: Yes, Your Honor, but the fact is with respect to our negotiations with Mr. Benham, these discussions have been ongoing with respect to all of these requests. And so it isn't as though in July there was a production in August, there was a production, and we had everything. So he has been given us a rolling production ever since has never said that this is all there is as of

July 2016. And it is in a way it's a bit of gamesmanship in that that's never been raised until now is an issue. And if it's related to the case, there is still time to go and get it in a supplemental way, but it just seems to be an unnecessary loop if it exists, and he knows what we're seeking --

THE COURT: Okay.

MR. BLACKWELL: -- if it exists. With respect to the HotDog and communication about the HotDog, Your Honor, we'd be content to have what, if anything, has been sent to consultants, experts, Kennedy Hodges firm, et cetera, related to the HotDog, that may be informing the kinds of claims and positions taken by plaintiffs in the litigation. We should be able to explore that, and to that extent that is relevant.

I do want to address he had thrown out this idea of bringing in the Fredrikson & Byron firm and saying we can use Fredrikson, and he would use Fredrikson, but we'll send you the bill. And at this point, there's just really no explanation for what's happened up to this point, that have e-mails been properly searched, what custodians did you look to? What terms did you use? It's not that we didn't get a production. We just don't know what went into it.

And before we decide that discovery is somehow inaccessible, and it needs to be some form of a

cost-sharing, a cost-shifting, we first have to know if that is indeed the fact.

And there was in fact a case that Your Honor was involved in, *Lindsay v. Clear Wireless LLC* in 2014, where there was some issues that came up around whether there should be some cost-shifting sort of thing, and it turns on whether or not the evidence is in fact inaccessible, whether the alleged difficulty is that it was so costly have been created by the producing party itself.

THE COURT: Well I don't accept it here, and the issue, I have no recollection of the issue you're talking about, although, I do remember that case quite well. But as I understand Mr. Benham's position, it is we're a third party witness. We're here under Rule 45, not under any of the discovery rules that govern parties. And we have certain rights and protections that parties don't have in discovery. Namely, we are protected by the rule that says you have to do something to minimize burden. And I forget the precise words, but they have -- they're in a better place than a party would be in terms of not being compelled to spend a whole bunch of time, money and effort, and especially in this case, attorney's fees, responding to discovery in a case to which they're not a party.

MR. BLACKWELL: I'd say, first and foremost, Your Honor, under Rule 45(d)(1), and the advisory committee notes

in the 1991 amendment, a nonparty served with a subpoena is subject to the same scope of discovery as a party, first off.

And, second, invoking a rule that speaks to the undue burden of a third party hardly justifies the third party simply producing inadequate and slip shod discovery, passing it off as a complete response, and then when called to account for it in the motion to compel, either claiming at that point undue hardship or as they did in the papers I just read from Dr. Augustine, crying almost poverty. We can't afford to do it, and we would get Fredrikson & Byron, except we can't afford to do it. And that's the first time we've heard anything about there being an issue about cost involved or cost issue since this was served I think back in June. I think it was served in June.

So and, Your Honor, it hadn't been a showing yet that there's anything that's unduly burdensome about this. From all accounts, it simply looks like they just simply did not do the proper job in canvassing the company to get responsive documents, and we've been subject to delay. We've been here on repeated motions before Your Honor in this Court to compel to get these responses. It's been delay, delay, delay. And suggesting that another firm be brought in, and then claiming undue hardship is simply the last round in this kind of behavior.

And sure enough, there are things we can ask Dr. Augustine at his deposition, but the point is to have the documents before the deposition, so you know what you want to ask about, and this has been a long train at this point. And there's one thing if they're not end this kind of undertaking that we found out was incomplete when they purported for it to have been complete and then we learned we didn't get the e-mails, and we learned all kinds of things that existed that they never admitted existed before, and then when called to account for it, undue hardship, unduly burdensome, can't afford it, et cetera. And I think in the context of the facts as they're presented here, that argument may not be well taken, Your Honor.

THE COURT: Okay. Is there something in particular you wanted to respond to, Mr. Benham?

MR. BENHAM: Well, there are three quick comments on each of them. I'll be less than a minute.

THE COURT: Tell me first before each one what it is you are responding before you give the response.

MR. BENHAM: Whether you have the power or not to breach the anonymity.

THE COURT: Okay.

MR. BENHAM: I'm not asserting that you don't have the power. I've seen citations or suggestions in articles that the FDA has intervened in some circumstances, but I

don't know what those circumstances are. I simply say that you shouldn't.

As regards whether we have an obligation to share all ongoing communications with anyone about Bair Hugger or not, I hope you understand that this is our only significant competitor. What 3M might well accomplish here is that we essentially stop talking about them. That would be the very best thing they could ever hope for coming out of this case, and it would do us tremendous harm.

I mean we shouldn't have to -- I mean this is not a Lanham Act case. This is not an unfair competition case in which they're saying we said wrong things about their product. And I think it's too much of a burden to ask us to share with them every communication we ever have in the future about their product.

And, finally, I want to make sure I understand as regards information about the HotDog. They have revised their incredibly expansive demands and said all they want is anything we've shared with plaintiff's counsel or consultants. Is that correct? I mean is that what you heard, Your Honor?

THE COURT: Don't look to me to answer your questions.

MR. BENHAM: But I will represent to you that that means nothing because there have been none. I'll go look

when I get back from my 40th anniversary trip. But short of that, I believe they just walked away from that entire area of discovery. Thank you, sir.

THE COURT: I'll just make this closing observation that apparently both Mr. Blackwell and Mr. Benham have made wise choices in choosing their wives over the Court in terms of their obligations to do whatever they need to do in the future. Mr. Blackwell told us this morning he's not going to be here for the next status conference because he's going to be visiting the birth place of Alexander Hamilton, I believe he said, correct?

MR. BLACKWELL: I didn't characterize it that way. Saint Kitts.

THE COURT: Okay.

MR. BENHAM: Thank you.

THE COURT: Thank you. And just to complete the record, I assume by reason of the state of the docket, the plaintiffs have no dog in this fight. Is that correct, Ms. Zimmerman or, I'm sorry, Ms. Conlin?

MS. CONLIN: You're correct, Your Honor. I mean I'd be happy to respond briefly.

THE COURT: No, I don't want to encourage more argument. I want to make sure the record was clear I wasn't rejecting something you wanted to offer.

MS. CONLIN: We have no dog in this fight. We

have been very clear with the Court since day one. With respect to inadequate filtration and disruption of air flow, we are making those claims, but we're not making them because Dr. Augustine has said them. We've made them because we've independently verified them to be true, and that's our position.

THE COURT: All right. Thank you very much. I will issue an order shortly. We are in recess.

(Court adjourned at 2:08 p.m.).

* * * * *

REPORTER'S CERTIFICATE

I, Maria V. Weinbeck, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: *s/ Maria V. Weinbeck*

Maria V. Weinbeck, RMR-FCRR